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### **Youth Protection and Liability Concerns**

Today, youth-serving nonprofits provide programming in a range of different settings: from in-person activities to virtual presentations and including various hybrid modalities in between. For these nonprofits, it is as important as ever to protect youth participants from various types of injury, whether online or offline, and to reduce their own exposure to liability. This Legal Alert provides a refresher on relevant practices and policies to have in place to limit liability.

#### **Where does organizational liability for youth-serving nonprofit organizations stem from?**

The primary circumstances in which an organization might face liability for an injury to a child are similar in the digital realm and in physical spaces: either as a result of intentional action or negligence, and could be the result of an interaction between or among students, employees, or both.

Traditional examples of an intentional action would be physical abuse or harassment. In a digital world, this could be cyberbullying or online discrimination. An organization could be liable for negligence if an unreasonable action or inaction causes an unintentional injury. For example, there may be negligence when a youth-serving nonprofit organization fails to have a sufficient number of adult chaperones during a field trip and a participant is injured as a result of limited supervision. In digital spaces, negligence might include failing to safeguard students' personal information, failing to put the appropriate protections in place to prevent cyberbullying and harassment, or failing to adequately screen employees who have access to children, even online. An organization may also be liable for negligent hiring if it fails to use reasonable care in selecting employees. Note that negligent hiring or supervision can also apply to volunteers' actions.

#### **What are some key ways to minimize organizational liability?**

##### ***Parental consents***

Organizations should use parental consents or permission slips as a way to proactively keep parents and guardians informed while at the same time obtaining a document that may be helpful in limiting liability if necessary. A parental consent should include a clear description of the activity to take place, any potential risks, and importantly, a place for the parent or guardian to acknowledge and consent to his or her child's participation in the activity. The activity description should capture the entire scope of programming, both online and offline, to help ensure that parents are aware of both what the in-person participation entails and/or the content that children may be exposed to through their online participation. If a nonprofit organization serves youths with particular needs or a certain activity presents heightened risk, permission slips could also include a place for an updated emergency contact.

Note that distributing a notice of the upcoming activity does not constitute parental consent, which requires an active response from the parents. Nevertheless, electronic signatures for

parental consents are generally acceptable and even email consents may work, so long as it is clear what the signatory is consenting to.

### ***Waivers and Releases***

Organizations should obtain a signed participation waiver/release for each participant (signed by a parent or guardian for those who are under 18 years-old) that describe the activities to take place and any risks. While waivers/releases should be drafted in unambiguous language that provides broad coverage of the activity, they should also be tailored to the activity and the youth participants. For example, a waiver/release for a field trip may cover transportation, food and physical activities, while a waiver/release for an online one-on-one mentoring session should include the parameters and timing of the online sessions, what platform will be used, what information can be exchanged (or not) in the sessions, and the extent to which conversations will remain confidential. Nonprofits may also want to use multiple methods of limiting liability, such as adding an on-screen disclaimer before the programming begins. While waivers and releases have limited enforceability, they are important as evidence that parents were informed of the programming circumstances and may help deter litigation.

If your organization has typically relied on third parties for waivers and releases, you should confirm that these documents still apply. In the same way, if your organization is one that has been “approved” by a school, you should confirm whether any existing waivers or releases release your organization from liability; if not, draft and obtain your own.

### ***Media/publicity releases and consents***

Media or publicity releases should ask for permission to use the photo, video, interview, voice, or name of the child participant. Be sure to ask for permission that is broad enough to cover all of the organization’s intended uses (e.g. for “any public use, including” a list of specific uses like posting a recording of a virtual meeting for participants who were not able to attend the live session).

Note that recordings of virtual meetings should not be used for marketing or publicity. When it comes to recording, New York is a one-party consent state, which means that a conversation can be recorded so long as one party has consented. If an organization plans to record its programming, it is best practice to provide notice of recording and future use of the recording and obtain parent consent ahead of time so they have a chance to opt out. Organizations may even want to provide a notification reminder before the start of the recording.

### ***Insurance***

Most organizations should already be protected by their existing insurance coverage. Organizations should ensure that they understand the type of insurance they maintain such as professional liability insurance and/or D&O insurance as well as the scope of their policy coverage— e.g., whether they have abuse or molestation insurance and whether volunteers would be covered under their policies. Since youth-serving organizations generally work with more vulnerable clients, organizations should understand whether there are any state or local requirements for abuse and molestation insurance and may even consider obtaining some coverage regardless of any statutory requirement. For any gaps in coverage, for example, if

children are transported in cars of volunteers who may not be covered by the nonprofit organization's insurance, it is particularly important for there to be waivers in place.

Organizations may also want to establish procedures in the event of accidents, including templates for written incident reports. From an organizational perspective, having written policies and procedures in place helps the organization with obtaining insurance and filing insurance claims.

### **What are some ways to ensure the best protection for the youth program participants?**

#### ***Background checks***

Many youth-serving organizations are already subject to regulations requiring background checks on employees. While the risk profile of virtual programming is different from that of in-person activities, organizations should still follow background check requirements that would apply to in-person events as closely as possible. This is particularly important today as some nonprofits are fully remote, which makes it more difficult to train and monitor new employees and volunteers that staff has never worked with in person. To maximize safety and reduce exposure to negligent hiring claims, nonprofits should also take other measures such as running names through the Statewide Central Register of Child Abuse and Maltreatment.

#### ***Privacy and security***

In a world where virtual programming is increasingly pervasive, the safety of youth participants also stretches to cybersecurity and privacy. Nonprofits must make sure that whatever digital platform is being used for programming is appropriately secure and that any additional security measures specific to youth are put into place. Nonprofits should look to the user agreement for any online tools to understand how data is being collected and stored so that nonprofits are prepared to inform parents accordingly. If a nonprofit organization has its own website, it should make sure to confirm that its terms of use and privacy policies are compliant and appropriate.

The Children's Online Privacy Protection Rule applies to the collection of personal information of youth under the age of thirteen. Nonprofits are generally exempt from this law, but the best practice is to comply with its requirements nonetheless—including providing notice and obtaining parental consent, as discussed above.

Other relevant laws in this space include the Family Educational Rights and Privacy Act, as well as state and city education privacy laws. Organizations should consult with legal counsel to determine how these laws (and whether other privacy laws) might apply to them.

#### ***Codes of Conduct***

Codes of conduct, while not legal documents, can be useful tools for guiding behavior. Organizations are encouraged to have codes of conduct for staff and volunteers who interact with the youth participants, and for the participants themselves, written in plain English be more practically useful. While nonprofits frequently face constraints on staff time, organizations are encouraged to periodically revisit, update and recirculate its written code of conduct as its programs grow and evolve. For example, if a nonprofit is shifting towards

predominately virtual programming, its code of conduct should cover confidentiality, data retention practices, social media guidelines (including limits on relationship and outside contact between staff or volunteer and youth participants) and cyberbullying as part of its anti-harassment policy.

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